

STATE OF MICHIGAN

IN THE SUPREME COURT

MILDRED L. LAWRENCE, Personal  
Representative of the Estate of LLOYD C.  
GINGER, Deceased

Plaintiff-Appellee

Supreme Court No.:  
Court of Appeals No.: 224874  
Lower Court No.: 98-973-NG

v

BATTLE CREEK HEALTH SYSTEMS,  
a Michigan hospital organization,

Defendant-Appellant

---

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**BRIEF ON APPEAL**  
**OF DEFENDANT-APPELLANT**

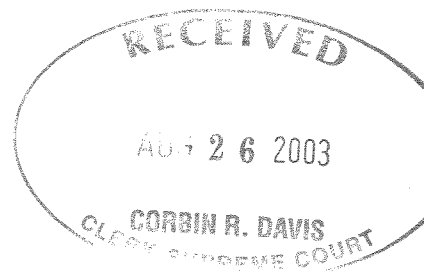
**ORAL ARGUMENT REQUESTED**

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### **Statement of Jurisdiction**

This Court has jurisdiction to review the issues raised in this case, pursuant to MCR 7.301(A)(2). An application for leave to appeal was granted on July 3, 2003.

**Statement of Questions Presented**

**I. Did The Trial Judge And The Court Of Appeals Err In Deciding That This Action Could Proceed As Ordinary Negligence, Rather Than Medical Malpractice?**

The trial court said: No.

The Court of Appeals said: No.

Defendant-Appellant says: Yes.

Plaintiff-Appellee says: No.

**II. Should SJ12d 10.02 Have Been Tailored To Instruct The Jury As To The Standard Of Care Applicable To A Reasonably Prudent Radiology Technician?**

The trial court said: No.

The Court of Appeals said: No.

Defendant-Appellant says: Yes.

Plaintiff-Appellee says: No.

**III. Should Directed Verdict/Judgment Notwithstanding the Verdict and/or New Trial Have Been Granted**

The trial court said: No.

The Court of Appeals said: No.

Defendant-Appellant says: Yes.

Plaintiff-Appellee says: No.

### **Statement of Factual Background and Material Proceedings**

This claim involves a June 26, 1997 accident when 86 year old Lloyd Ginger (now deceased) presented at Defendant-Appellant Battle Creek Health Systems (hereinafter BCHS) for a radiologic bone scan. While getting off the table, he fell and fractured his right hip. Plaintiff-Appellee filed an ordinary negligence action, a step which was challenged by the Defendant through repeated motions. The trial court allowed the matter to proceed to jury trial as an ordinary negligence action, and refused a request to tailor the standard jury instructions to reflect the standard of care applicable to a radiology technician. A verdict eventually entered, finding that the hospital staff was negligent. However, the jury found that the technician-trainee who actually performed the procedure was not negligent, while the supervisor (who did not participate) was at fault. The trial court rejected post-verdict motions challenging the contradictory verdict as well as the ordinary negligence/malpractice distinction and the jury instructions. The Court of Appeals upheld the trial court.

### **Medical and Factual Background**

Mr. Ginger was an 86 year old man with a history of multiple myeloma going back to 1989. He treated with Dr. Smiley from 1990 on, and was referred by the doctor for a repeat bone survey and chest x-ray, to be done on an outpatient basis on June 26, 1997. After the films were taken, he tried to get off of the table, but fell and fractured his right hip (specifically a fractured right femur in the intertrochanteric region). Surgery was performed to reduce the fracture and insert a screw and plate. The patient was discharged in stable condition for further rehabilitation. (See BCHS medical records attached to Defendants motion for summary disposition as Exhibit A; App pp 7-24).

### **Procedural History**

Plaintiff<sup>1</sup> filed a complaint on March 6, 1998. Plaintiff alleged that the hospital's employees breached a duty "to provide ordinary care" including various more specific allegations directed at preventing the table from moving and having an attendant present, as detailed at paragraphs 8 and 9 of the complaint (App pp 27). Essentially, Plaintiff argued that BCHS was negligent because its employees failed to prevent the fall.

In lieu of an answer, BCHS initially filed a summary disposition motion, arguing that the claim should have been brought as a malpractice action (App pp 30-43). That motion was denied at a hearing on June 15, 1998 (App p 44-61) and an order entered on the same date (App p62).

Following discovery, a renewed motion for summary disposition was filed (App pp 63-76), again addressing the negligence/malpractice issue. The motion was heard and denied on November 16, 1998 (App pp 77-103). An Order entered on December 2, 1998 (App p 104).

BCHS raised the issue a third time, through a motion in limine to identify and limit the allegations of negligence (App pp 105-110). This motion was heard and denied on February 8, 1999. (App pp 111-129).

Trial commenced on July 28, 1999 and continued through a verdict on July 30. A total judgment ultimately entered in the amount of \$182,035.64, as well as costs.

On July 29 and 30, the Court considered a motion for directed verdict by BCHS, arguing the ordinary negligence/malpractice distinction as well as the failure to satisfy the burden of proof even as to an ordinary negligence action. The Court heard and denied the motion (App pp 155-177). Subsequent to trial, those issues and a questionable jury instruction were the subject

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<sup>1</sup> The action was originally filed by Lloyd Ginger, deceased. After his death, the action continued through the Personal Representative, Mildred Lawrence. For purposes of this action, the two will be referred to jointly as Plaintiff.

of motions for judgment notwithstanding the verdict (App pp 181-195) and for new trial (App pp 196-214). These motions were heard on November 8, 1999 (App pp 215-240) and denied by an opinion issued January 10, 2000 (App pp 241-247).

An appeal of right was filed with the Court of Appeals. Oral argument was granted, and heard on May 7, 2002. An unpublished opinion was issued on June 4 (App pp 248-251), rejecting the defense arguments. An application was filed with this Court, and granted by an order dated July 3, 2003 (App p 252).

### **Opinions and Orders Appealed From**

The initial summary disposition motion focused upon the allegations in the complaint, and the defense argument that the issue involved “a matter of medical management and care.” The Court must “look behind the allegations” to determine “whether or not the technician complied with the physician’s orders, whether or not the support staff should have supplied more support for this gentleman.” (Tr p 5; App p48). The trial judge asked several questions of Plaintiff’s counsel, in an effort to determine how the fall had occurred, but no clear explanation was available (Tr pp 6-11; App pp 49-54). The defense noted that the complaint was the focus at this stage, and the allegations related to professional duties, at least in part (Tr pp 12-13; App pp 55-56). The trial judge denied the motion at this time, noting:

Some of the allegations as argued by defense counsel certainly sound like malpractice or at least tend towards that end of the spectrum, while others are certainly, as Mr. Jereck argues, seem to sound like ordinary negligence . . . But I think it is premature to grant the motion without having some opportunity to get the facts as to exactly what happened. (Tr pp 14-15; App pp 57-58).

The judge added that, in his opinion “if he was changing positions and simply fell off, that sounds more perhaps like ordinary negligence” (Tr p 16; App p 59).

By the time of the hearing on the renewed summary disposition motion on November 16, 1998, Judge Miller had reviewed discovery materials supplied by the parties, and took a different

approach. He thought that it sounded like the patient “just got a little dizzy or maybe got up too fast . . . and fallen off, which is - - from her testimony, sounds exactly like what happened.” The judge noted that “it certainly doesn’t sound like any kind of malpractice. It sounds - - it sounds more like a question of ordinary negligence.” (Tr p 11; App 87). He added that “if there was ever a case where ordinary negligence would be the - - the way to go, this would probably be it because that’s probably what it is as opposed to some kind of medical malpractice.” (Tr p 12; App p 88). He then noted that it was ordinary negligence rather than “malpractice to not help somebody off the table in a particular way”. After some discussion, the judge eventually held that the “dispositive question is whether the facts set forth issues that are within the common knowledge and experience of the jury or raise a question of medical judgment”. On the facts before him, he denied the motion. He noted that “getting on and off a table and with an elderly - - the factors are fairly - - fairly simple.” (Tr pp 23-24; App pp 99-100).

Debate on the motion in limine, heard on February 8, 1999, began with clarification of the defense argument that there was no evidence to support a common law claim of ordinary negligence against Mr. Horton, the supervising technician who didn’t participate in the event which led to the accident. The only claim against him could flow from his supervisory role and must sound in malpractice (Tr p 4; App p 114). Plaintiff argued that the lack of evidence as to what Mr. Horton had done justified proceeding against him, as the evidence at trial might demonstrate negligence (Tr pp 5-7; App pp 115-117). Although Plaintiff’s counsel attempted to focus the discussion upon court rules regarding amendment of pleadings, the court found that the real issue before it was whether Plaintiff could present a theory of negligence against Mr. Horton which was supported by the proofs (Tr pp 8-12; App pp 118-122). The judge then denied the motion, although he found it “an interesting question.” He noted there were fact questions as to exactly what Mr. Horton had done, and thought that a jury could find common law negligence

depending upon how the testimony went (Tr pp 15-18; App pp 125-128).

The defense motion for directed verdict was presented on July 29, 1999. It renewed the argument regarding the ordinary negligence/malpractice dispute (Tr pp 292-926; App pp 155-159), requested that the jury instruction used in ordinary negligence cases (SJI2d 10.02) be tailored to reference an ordinary technician (rather than person) (Tr pp 296-298, App pp 159-161), and sought dismissal of any claims as to Mr. Horton and Ms. Kever based upon lack of proofs as to duty and breach (Tr pp 298-301; App pp 161-164). A modification of the standard jury instructions was discussed again (Tr p 310; App p 165), as was a request for certain malpractice instructions which were argued to be applicable even if this case was postured as involving ordinary negligence (Tr pp 316-17; App pp 166-167).

The following day, the directed verdict subjects were taken up again. The trial judge first rejected the malpractice argument.

*THE COURT: Okay. Well, here's my ruling. I'm going to deny the motion for directed verdict. The case cited is instructive and interesting. It's a series of cases actually that the Supreme court addressed and there is the language that Mr. Wyngaarden has argued, and it certainly is a close case. I recognize that fact. The arguments made by the defendant are--are certainly good ones and an appellate court may well--well decide that they are the proper arguments and that this Court should have granted a motion for summary disposition and/or a motion for directed verdict. I can see that as a possibility, but as the court has previously recognized, there is the possibility of suing on a claim of ordinary negligence in what would otherwise be seen perhaps as a medical malpractice action. ( Tr pp. 340-41; App pp 168-169).*

The Court next rejected the defense request to instruct the jury regarding a reasonably prudent technician, finding it to be much like arguments raised in previous summary disposition motions and distinguishing case law cited by the defense (Tr pp 343-44; App pp 170-171).

*And I may be wrong about that. It may well be that -- quite to the contrary, if there is some verdict for the Plaintiff, that on appeal the Court of Appeals will reverse me. It wouldn't be the first time that's happened and so that's very possible and I recognize the possibility. (Transcript pp. 344-45; App pp 171-172).*

The next topic of discussion was the request for directed verdict, particularly as to Mr.

Horton, given the lack of proofs.

*MR. WYNGAARDEN: I think we've just heard a professional negligence theory once again stated directly against Mr. Horton involving issues of instruction and—and that summary of Mr. Jereck reflects the fact that there has never been a prima facie case against either Mr. Horton or Ms. Kever put on the record, and what's going to happen this morning is that this case is going to go to the jury on pure speculation, no expert testimony, nothing but Mr. Jereck's opinions on what people should or should not do. That is not what the—the rule of law requires in this case and particularly as to Mr. Horton there should be a finding that since it's—it's not in dispute from any of the three witnesses relative to his presence at the—at the x-ray table, that an issue of negligence as to him has not been established.*

*THE COURT: Well, you may well be right on that issue, too, but I'm going to deny the motion to dismiss him and it's—this is probably even—this is closer than the question of the—whether it should have been a malpractice action. (Tr pp. 347-48; App pp 173-174).*

In spite of the holdings, the trial judge indicated that even he was still having some difficulty in determining exactly where the Plaintiff was headed with the case. His discussion during the final portion of the ruling demonstrates the mix of both ordinary negligence and professional responsibility which this case involved.

*As I understand the plaintiff's theory it is that the—that in effect there are—there were a combination of circumstances here. The—the—perhaps the physical health of the plaintiff and the fact that he—he had been diagnosed as having cancer, bone cancer, that the procedures engaged in were by necessity perhaps but in actual fact those that would perhaps raise a duty—the plaintiff had to get on a table that according to Ms. Kever was three-and-a-half feet wide I think she said, fairly narrow, that under the particular circumstances here where as I understand the testimony the—the plaintiff was laying on his stomach on a fairly narrow table. He was 86 years old at the time, that given all those circumstances and the table being a certain height off the ground and so on, not—not something a foot off the ground but obviously a little higher than that, and the end and conclusion of the x-rays and the thought that the plaintiff might try to get up, under all those circumstances that there was some duty for the people who were present to aid him in some way or at least to watch him perhaps so that he would not fall from this height on a fairly narrow table given his particular age and circumstances and so forth. The—in effect a duty that would be imposed upon anybody who might be there and—and—and be aware of all those circumstances. (Tr pp. 349-350; App pp 175-176).*

The judge noted: “under all those circumstances that there was some duty for the people who were present to aid him in some way or at least to watch him perhaps so that he would not fall from this height on a fairly narrow table given his particular age and circumstances and so

forth.” (Tr pp 350; App p 176). He then noted:

I guess there’s some evidence certainly that one could argue to the jury that one was a student, one was in charge of the place so to speak and clearly in charge of the student, that there might have been possibly some negligence on the part of Mr. Horton in not himself being available or not directing Ms. Kever to do something differently, whatever that might be. (Tr pp 350-51; App pp 176-177).

A hearing on motions for JNOV and new trial was heard on November 8, 1999. The defense argued that the case should have been brought as involving malpractice, and there was no testimony of a specific breach of duty, even under an ordinary negligence theory (Tr pp 4-5; App pp 218-219). A new trial was argued to be appropriate as the claim should have been treated as malpractice, that Plaintiff tried the case as a malpractice action, that the jury instructions were not properly tailored, and that even under a general negligence theory the proofs were inadequate, particularly in light of a verdict which found negligence by Mr. Horton only. (Tr pp. 11-13; App pp 225-227). Plaintiff argued that the case should have been ordinary negligence from the start and there was no need for a professional standard and proofs thereof. Paradoxically, Plaintiff noted that there was a professional relationship between the patient and Mr. Horton, as the latter had turned the x-ray room over to a student when he had a common law duty to “make sure that Mr. Ginger didn’t fall off the table.” (Tr p 16 ; App p 230). Plaintiff argued that any modification of the jury instruction would have basically turned the case into a malpractice action (Tr pp. 18-19; App pp 232-233). The defense rebuttal noted that, in spite of all of the discussion, Plaintiff had yet to demonstrate a prima facie case as to either duty or breach (Tr p 21; App p 235). The court took the matter under advisement, and issued a written opinion on January 10, 2000. The trial judge found that a central theme running through most of the defense argument was the ordinary negligence/malpractice distinction. He then followed the cases which have

found ordinary negligence in previous situations,<sup>2</sup> and concluded that the present case involved ordinary negligence (Op pp 2-5; App pp 242-245). The court then considered whether an ordinary negligence case had been made:

Plaintiff claims that the defendant's employee had a duty to plaintiff to make sure that he, an elderly man in less than perfect health, did not fall from an examination table. That is a fairly straightforward proposition. If this isn't a case for an ordinary negligence claim by a patient in a hospital setting, it is difficult to contemplate what the case would be for any ordinary negligence claim in such a setting. (Op p 5; App p 245).

The Court then addressed Mr. Horton, and noted that he "was physically present" but "was not close enough to prevent the fall which, of course, is part of plaintiff's contention that Horton was negligent." (Op p 5; App p 245). The trial judge found it significant:

that Horton knew of plaintiff's age and medical background and was familiar with the table plaintiff had to get on and off of . . . Horton was directing plaintiff in a situation where it was reasonable to assume plaintiff would be relying upon Horton's instructions as to what he, plaintiff, was to do and when he was to do it. . . It is likewise arguable that Horton was negligent in his admitted failure to observe the plaintiff and to be ready to provide immediate assistance to him, given the plaintiff's age, health, and physical circumstances . . . It is also arguable that Horton, unlike the young student trainee Ms. Kever, had years of experience in observing patients and any difficulty which those patients might have in negotiating themselves on and off an examining table. (Op p 6; App p 246).

The Court found a jury question "of whether Horton failed to act as a reasonable person would under like circumstances." The judge added that the jury "was properly instructed on the appropriate standard of care." The "same logic . . . also suffices" to justify denial of both motions (Op p 7; App p 247).

The Court of Appeals issued an unpublished opinion on June 4, 2002.<sup>3</sup> The decision

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<sup>2</sup> Three cases are frequently relied upon by plaintiffs in situations such as this, and will be discussed below. They include Fogel v Sinai Hospital of Detroit, 2 Mich App 99; 138 NW2d 503 (1965), Gold v Sinai Hospital of Detroit, 5 Mich App 368; 146 NW2d 723 (1966) and McLeod v Plymouth Court Nursing Home, 957 F Supp 113 (ED Mich 1997).

<sup>3</sup> The appeal was captioned Mildred L. Lawrence, Personal Representative of the Estate of Lloyd C. Ginger, deceased v Battle Creek Health Systems.

focused primarily on the ordinary negligence/malpractice distinction (Op p 1; App p 248). The court found that there were “no issues requiring expert medical testimony. Instead, the jurors were asked to draw upon their respective experiences to determine defendant’s liability, if any.” (Op p 2; App p 249) The court went on to note that the motion for JNOV should be denied, as a prima facie case of negligence could be made by a showing of violation of the common law duty to use due care or to act so as to not unreasonably endanger others. (Op p 2; App p 249). The court then commented upon Mr. Horton, noting that he did not help the patient off the table, while at the same time stating that testimony established that “no special expertise or knowledge was required in order to help the patient get on and off the x-ray table.” The court then speculated that “the jury was given the opportunity to see both the instructor and the student, and to perhaps consider their size difference as it related, if at all, to the issue of ordinary negligence in not properly assisting Ginger off the table.” (Op p 2; App p 249). Finally, the court found “no merit to defendant’s claim of instructional error.” The instructions viewed as a whole were appropriate, the court having “already concluded that plaintiff’s action alleged ordinary negligence” and SJI 2d 10.02 was adequate (Op p 3; App p 250).

#### **Available Testimony Regarding the Incident**

Only three people were present during the accident which led to this claim. No expert witnesses were called at trial, and the three participants, Mr. Ginger, Ms. Kever and Mr. Horton, are the only sources to help fill in the details of the circumstances leading up to the fall.

Mr. Ginger testified that he couldn’t recall whether he had any assistance getting on the table, where Mr. Horton was, and when Ms. Kever became involved (Tr pp 95-96; App pp 134-135).

A: *He was there someplace. Anyway, she set me up for the picture and he came by and checked it, made no changes. He never made a change anytime. He—he checked every time—every picture that was made, he checked them, but he did not*

*change—make a change in the picture—*

*Q: Now—*

*A: —so the girl wasn't that dumb. She was—knew more about this than—than they gave her credit for.*

*Q: Okay. So explain to the jury though when you say she set you up, what—what do you mean by that? She positioned you on the table?*

*A: She positioned me and—a certain way and set me that way, and he come by and checked it. He made the same movements that she did but he didn't make any changes—*

*Q: All right. So—*

*A: —so he was—wasn't needed, really. (Tr p 96; App p 135).*

\* \* \* \*

*Q: Did he tell you what this young lady was doing there?*

*A: No.*

*Q: Did she tell you what she was—*

*A: No.*

*Q: —doing there?*

*A: No.*

*Q: Anybody ask you if it was all right that she was there doing that?*

*A: No. Nobody asked me. Nobody told me.” (Tr p 97; App p 136).*

Mr. Ginger recalled lying on the table hearing some conversation after the x-rays were completed, and he rested with his eyes closed for what seemed like a couple of minutes (Tr pp 98-100; App pp 137-139).

*Q: Okay. Tell us what happened after that.*

*A: That's—after that is when I was laying there with my eyes closed. I thought maybe I could grab a wink of sleep or something, but it didn't last that long.*

*Q: Why not?*

A: *The—the girl screamed real loud and about that time I felt myself moving and I slid off of the end of the—the table. . . . and I hit the floor and when I - - when I woke up from laying the floor, I couldn't move my leg and this girl was underneath my head and shoulders. (Tr p 101; App p 140).*

\* \* \* \*

Q: *When you heard her scream, could you tell the jury where she heard—where you heard the scream come from.*

A: *It was close by in—in the room close by the table. I don't know how close. It was—she wasn't on the table.*

Q: *She wasn't right next to you?*

MR. WYNGAARDEN: *Object to form again.*

THE WITNESS: *She wasn't—nobody touched me. They talk about somebody grabbing me. Nobody touched me.*

BY MR. JERECK:

Q: *How—*

A: *I hit the floor and then when I hit the floor, she was underneath my head and shoulders. How she got there, don't ask me. (Tr pp 102-103; App pp 141-142).*

On further questioning, Mr. Ginger noted that Ms. Kever had helped him adjust position between each x-ray, and “was doing it right to start with” (Tr p 141; App p 143). He acknowledged that he could recall hearing voices and “the next thing you recall is hearing the girl scream” (Tr p 145; App p 144). In fact, he appreciated her efforts in protecting his head, speculating that he might have wound up in a funeral home if not for her (Tr pp 145-146; App pp 144-145).

Brooke Kever offered pertinent trial testimony as follows:

A: *Steve will get the film from the pass box and he'd walk around here and hand me the film and I would put it in the tray that's - - goes underneath the table here.*

Q: *Okay. Then what would Steve do?*

A: *Steve would take the previous film that I had taken if there was one, I'd give it to him, he'd come back behind the control panel and put it through the pass box.*

Q: *And what would you do with the film then?*

A: *I would put the new film in the tray that goes under the table and then I would start positioning Mr. Ginger.*

Q: *All right. Then what would you do?*

A: *I would position him on the table, move the table to where we needed to x-ray, adjust the light field for that, and then I would come back behind the control panel as we took the x-ray. (Tr pp 228-29; App pp 146-147).*

\* \* \* \*

Q: *And what did you say to Mr. Ginger?*

A: *I was starting to tell him that we were done with the exam and that he could go ahead and sit up.*

Q: *And did you help him?*

A: *No, I did not help him.*

Q: *Okay. And what--what happened when you told him it was finished?*

A: *He started to roll over from his stomach and he shifted--shifted his hips and started to come back towards me and the next thing I knew we were both on the floor.*

Q: *And Mr. Horton was back in--behind the doogiggy here?*

A: *Control panel, yes.*

Q: *Control panel. So Mr. Horton's head--or Ginger's head is up here, right?*

A: *Correct.*

Q: *On his stomach, right?*

A: *Correct.*

Q: *And you say you're standing right there?*

A: *Yes.*

Q: *And I think--would you say he surprised you by his--the nature of his movement?*

A: *Yes.*

Q: *What surprised you?*

A: *The quickness that he moved and just the awkward way in which he came back. (Tr pp 233-34; App pp 148-149).*

Q: *Now, the - - can you - - can you describe for the jury the sequence of events after you took this - - this final right lateral skull to the point in time when Mr. Ginger and you were falling from the table.*

A: *When - - after we took the last film, Steve and I came out from behind the control panel. I took the film out of the tray that's under the table, handed it to Steve. He then took it behind the control panel.*

*While he was doing that, I told Mr. Ginger that we were done and that he could go ahead and sit up, and as he started to roll to sit up, he just started to come back towards me, and the next thing I knew we were both on the floor. (Tr pp 255-256; App pp 150-151).*

Q: *And--and how--how close were you to the table as this occurred?*

A: *I was right up next to the table.*

Q: *Which is where you felt you should be?*

A: *Correct.*

Q: *In fact, you felt you were in the right position for the--these movements?*

A: *Yes.*

Q: *And in spite of that, in spite of grabbing him, you both fell to the floor?*

A: *Yes. (Tr p 257).*

Mr. Horton testified that he was behind the control panel and didn't see the accident (Tr p 262, App p 152).

Q: *Did you have any concern at that time that Mr. Jereck (sic) couldn't complete the bone survey?*

A: *None at all.*

Q: *Did you have any prob - - concern that Brooke couldn't perform her role as a student assistant for this procedure?*

A: *No, I did not.*

Q: *And why is that?*

A: I - - Brooke had been in the clinic a long time, had training and a lot of contact with patients. She had completed many x-rays similar to what are put together in a bone scan and I had confidence in her as a student. (Tr p 278; App p 153).

\* \* \* \*

Q: And as far as Brooke's positioning at the table, do you--do you believe that there was inappropriate on her part as to where she was standing?

A: Absolutely not.

Q: Why not?

A: It's the more common place for somebody to stand. A patient's upper body, obviously, is the heaviest part. There's more vital organs such as the head in the upper body. If you're positioned towards the middle of the patient or down by the legs and the patient goes down, you're going to be in a bad position to prevent the fall. The upper part of the body is the place to be. (Tr p 284; App p 154).

**Argument I    The Trial Judge And The Court Of Appeals Erred In Deciding That This Action Could Proceed As Ordinary Negligence, Rather Than Medical Malpractice**

**A.    Standard of Review**

This issue was raised on four separate occasions before the trial court, including two motions for summary disposition prior to trial under both MCR 2.116(C)(8) and (10), a motion for directed verdict at the close of Plaintiff's proofs, and a motion for judgment not on the verdict or, in the alternative, a new trial, subsequent to the jury verdict.

A motion for summary disposition is reviewed *de novo*. Roberts v Mecosta County General Hospital, 466 Mich 57, 642 NW2d 663 (2002). A motion for failure to state a claim under MCR 2.116(C)(8) tests the legal sufficiency of the Plaintiff's claim, to determine whether the allegations are sufficient to establish a *prima facie* case. The motion is decided on the pleadings alone, and other evidence is not considered. Spiek v Department of Transportation, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion brought under MCR 2.116(C)(10) tests the factual basis for a Plaintiff's claim. Summary disposition is appropriate when there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. Skinner v Square D Co, 445 Mich 153, 161; 516 NW2d 475 (1994).

A motion for directed verdict is decided by viewing the evidence in the light most favorable to the opposing party, to determine whether that party has established a *prima facie* case. May v Harper Hospital, 185 Mich App 548; 462 NW2d 754 (1990). This Court conducts *de novo* review of a directed verdict motion by considering the testimony and all legitimate inferences that may be drawn in the light most favorable to the Plaintiff. Town v Michigan Bell Telephone Co, 455 Mich 688; 568 NW2d 64 (1997).

A motion for judgement not on the verdict is decided by viewing the evidence and all legitimate inferences that may be drawn in the light most favorable to the non-moving party. If reasonable jurors could honestly have reached different conclusions after evaluating the evidence, the motion should be denied. Matras v Amoco Oil Co, 424 Mich 675; 385 NW2d 586 (1986). Appellate courts conduct *de novo* review of the evidence presented at trial to determine whether the trial court clearly erred in denying the motion. Badalamenti v William Beaumont Hospital, 237 Mich App 287; 602 NW2d 854 (1999).

Grounds for a new trial are covered by MCR 2.611(A)(1) including (e) a verdict or decision against the great weight of the evidence or contrary to law and (g) error of law occurring in the proceedings, or mistake of fact by the Court. A trial court's decision on a motion for new trial is discretionary, and will not be disturbed unless an abuse of discretion is shown. McLemore v Detroit Receiving Hospital, 196 Mich App 391; 493 NW2d 441 (1992). A trial court may grant a motion for new trial, although its discretion is not unlimited and it may not substitute its judgment for that of the finders of fact. Carden v General Motors Corp., 156 Mich App 202; 401 NW2d 273 (1986).

## **B. Definition of Medical Malpractice**

There is no clear line to separate the ordinary negligence and medical malpractice, and a survey of case law regarding the historical development of the topic, followed by a review of cases which have found ordinary negligence in claims against treatment providers, is called for.

### **1. Historical Development of a Definition**

An early, but still relevant, consideration of professional malpractice by this Court is found in Delahunt v Finton, 244 Mich 226; 221 NW 168 (1928). The pertinent issue involved an allegation that the jury instruction did not properly reflect the professional duty of the defendant doctor. "Malpractice, in its ordinary sense, is the negligent performance by a physician

or surgeon of the duties devolved and incumbent upon him on account of his contractual relations with his patient.” Id at 230. This Court also noted that “a case of alleged malpractice” requires “medical testimony to the effect that what the attending physician or surgeon did was contrary to the practice in that or similar communities, or that he omitted to do something which was ordinarily done in that or similar communities. (Citation omitted) Defendant’s negligence cannot be presumed, but must be affirmatively proved.” Id at 230.

In 1981, the Court of Appeals wrote at some length on the definition of medical malpractice. The case involved a special care unit in a hospital, and improper supervision of one patient leading to injury to one of the plaintiffs. After a verdict for the defense, the plaintiffs challenged the jury instructions, which had framed the issues in terms of professional negligence.

The essence of plaintiffs’ objections is that their cause of action was based upon ordinary negligence rather than malpractice.

It is a well-settled general rule in Michigan that expert testimony is required in an action for malpractice against a hospital.

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There is also a well-recognized exception to that general rule as stated in 40 ALR 3rd 515, 523:

“[Where] a hospital’s negligence was such as to be within the comprehension of laymen and to require only common knowledge and experience to understand and judge it, expert evidence is not required to make out a case against a hospital for the injury or death of a patient resulting from such negligence.”

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Plaintiffs’ allegations of negligence at trial involve the supervision necessary in the “special care unit” and the type of restraints that should have been used on the elderly patient. . . . the issues in the case at bar, with regard to the degree of supervision in the “special care unit” and the adequacy of restraints, are issues involving professional judgments which are beyond the common knowledge and experience of laymen to judge. Starr v Providence Hospital, 109 Mich App 762; 312 NW2d 152 (1981).

This Court touched on a definition when deciding Wilson v Stilwill, 411 Mich 587; 309 NW2d 898 (1981). The claim alleged that the defendant physician as well as co-defendant hospital were responsible for a post-surgical infection. The plaintiffs argued that the hospital

failed to establish standards of conduct which would have prevented the infection, a claim which was disposed of by directed verdict at the close of plaintiffs' proofs.

The plaintiffs contend that this case presents a question of ordinary negligence and that no expert testimony was necessary. With respect to this assertion, it seems evident that whether a hospital's negligence must be shown by expert testimony depends on the circumstances of the particular case. The plaintiffs rely on two cases in support of their theory. . . . However, these cases presented issues which are within the common knowledge and experience of a jury. In contrast . . . , the instant case presents a standard of conduct issue which cannot be determined by common knowledge and experience, but rather raises a question of medical judgment. If questions regarding this standard were presented in a malpractice case involving a physician or dentist, expert testimony would be required to establish the standard. (Citations omitted.) Similarly, when a medical malpractice action not involving ordinary negligence is brought against a hospital, as a general rule, expert testimony is required. *Id* at 611-612.

A frequently cited opinion was issued by the Court of Appeals in 1982. Plaintiff sought treatment at a hospital emergency department following a fall, and was advised he had no broken bones, although his foot was, in fact, fractured. Summary disposition was granted, as the claim was not filed within the two year medical malpractice statute of limitations. The court first determined that, when a claim against a hospital involved allegations of malpractice by treatment providers working therein, the Legislature intended such hospitals to be covered.

Plaintiff claims in his brief, however, that his complaint is one for ordinary negligence, not for malpractice. The type of interest allegedly harmed is the focal point in determining which limitation period controls. (Citations omitted.) The applicable period of limitations depends upon the theory actually pled when the same set of facts can support either of two distinct causes of action. (Citation omitted.) The gravamen of an action is determined by reading the claim as a whole. (Citation omitted.)

The crux of the plaintiff's complaint is that the staff of the defendant hospital misdiagnosed the plaintiff's injury, then misinformed the plaintiff. The complaint alleges that the medical attention rendered by the hospital staff to the plaintiff breached the standard of care practiced in the medical community.

We believe that this allegation falls squarely within the definition of medical malpractice in *Cotton v Kambly*, 101 Mich App 537, 540-541; 300 NW2d 627 (1980), *lv den* 411 Mich 1033 (1981):

“[Medical] malpractice \*\*\* has been defined as the failure of a member of the medical profession, employed to treat a case professionally, to fulfill the duty to exercise that degree of skill, care and diligence exercised by members of the same profession, practicing in the same or similar locality, in light of the present state of medical science.” Adkins v Anapolis Hospital, 116 Mich App 558; 323 NW2d 482 (1982), *aff’d on other grounds*, 420 Mich 87 (1982).

The same year, the Court of Appeals decided Warfield v City of Wyandotte, 117 Mich App 83; 323 NW2d 603 (1982). At issue was whether care and supervision by staff in a psychiatric unit involved ordinary or professional negligence.

The thrust of plaintiff’s argument is that the failure of the hospital’s nursing staff and attendants to more adequately take care of the patient when the patient’s mother complained to them and when the patient was so obviously ill and dehydrated constitutes ordinary negligence. Where the acts complained of involve issues of ordinary negligence an instruction on ordinary negligence rather than professional negligence is proper. (Citations omitted.) That is not the situation in the instant case where the basic issue involved was whether a patient, whose own family doctor diagnosed the decedent as suffering from a psychiatric disorder and advised that she be admitted to defendant hospital for psychiatric care, was given the proper care in the hospital for the condition for which she was admitted. Obviously, the answer to that question requires professional training, skill, and judgment. Id at 92-93.

Another decision regarding supervision, this time of a seizure patient, was issued in Waatti v Marquette General Hospital, Inc., 122 Mich App 44; 329 NW2d 526 (1982).

Plaintiffs next assert that expert testimony was not required because only issues of ordinary negligence were presented. They claim that the leave a seizure patient unattended with the hospital bed’s side rails down is so obviously negligent as to present issues cognizable by an ordinary layman. (Citation omitted.) We disagree. Whether a seizure patient requires constant medical attendance or restraints is an issue of medical management to be established by expert testimony. Id at 49.

A 1985 case involved a claim against a pharmacy for providing the wrong medication when filling a prescription. The action was timely under a general negligence statute of limitations, but was untimely if it sounded in malpractice.

The complaint alleges a breach of duty which arose out of the professional relationship between defendant, a pharmacist, and the decedent, his client. Plaintiff has attempted to couch the complaint in terms of negligence; however,

the complaint is clearly one for malpractice. Id at 483.

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It is clear to us that the defendant is a member of a licensed profession. (Citation omitted.) Plaintiff has alleged a failure on the part of the defendant to properly discharge his professional duties, thus causing damage to plaintiff. The key to a malpractice claim is whether it is alleged that the negligence occurred within the course of a professional relationship. The allegations of this complaint indicate that the negligence occurred within such a relationship. No matter how we read plaintiff's complaint we must return to the conclusion that this is a malpractice claim. Id at 485.

Another decision worthy of consideration is Thomas v McPherson Community Health Center, 155 Mich App 700; 400 NW2d 629 (1986). A patient developed an infection following abdominal surgery, allegedly due to improper use and/or installation of a cauterization device.

This Court has recognized that in medical malpractice cases issues of negligence and causation are normally beyond the ken of laymen. (Citation omitted.) Thus, in an action for malpractice against a hospital, expert testimony is required to establish the applicable standard of conduct, the breach of that standard, and causation. (Citations omitted.) There are two closely connected exceptions to this requirement. Where the negligence claimed is "a matter of common knowledge and observation," no expert testimony is required. (Citation omitted.) And, where the elements of the doctrine of *res ipsa loquitur* are satisfied, negligence can be inferred. (Citation omitted.)

Plaintiffs argue that . . . the help center's alleged furnishing of a defective electrocauterizer, or failure to properly ground the equipment constituted "ordinary negligence" as evidenced by injury to a non-treated body part. . . . The contention is without merit. Unlike the above cases, here Mrs. Thomas' injury was susceptible to a number of explanations, all of which required medical knowledge to discern. Thus, the "ordinary negligence" exception to the requirement of expert testimony does not apply on these facts. Id at 705-706.

Bronson v Sisters of Mercy Health Corporation, 175 Mich App 647; 438 NW2d 276 (1989) addressed "whether an action brought against a hospital asserting negligent selection, retention and supervision of staff doctors is an action for malpractice against the hospital for purposes of the statute of limitations." Id at p 650. The Court noted that "certain hospital errors in patient treatment may constitute ordinary negligence rather than malpractice," but noted that the exceptions "involve breaches of duties not arising from the rendering of professional medical

services. (Citation omitted.) The key to a malpractice claim is whether it is alleged that the negligence occurred within the course of a professional relationship.” Id at 652.

Plaintiff’s complaint alleged that defendant hospital did not comply with the standard of care and skill of hospitals in similar localities. It alleged that defendant hospital breached its duty to meet this standard of care in its care and treatment of plaintiff, in its selection and supervision of staff, and in providing a safe environment for post-surgical care. In some, plaintiff claimed defendant hospital was negligent in performing those professional services rendered by a hospital. Id at page 653.

A case which involved a factual situation very similar to that presented herein was heard by this Court in 1998. The Court of Appeals overturned a trial court order granting summary disposition, finding that “neither medical expertise nor professional training or supervision is required to appreciate that in lifting a patient from a wheelchair to an examining table, the task should be accomplished without perpetrating a personal injury.” See unpublished opinion in Regalski v Cardiology Associates, P.C., COA #195425 (1997 Mich App LEXIS 3390) (App pp 253-255). After this Court granted an application, the holding was short and concise:

In the present action, the plaintiff has alleged Elizabeth Regalski was injured because the defendant’s technician was negligent in assisting the patient’s movement out of a wheelchair and on to the examination table where the technician then performed the cardiac test for which the defendant had been consulted. Like the trial judge, we are persuaded that the technician was “engaging in or otherwise assisting in medical care and treatment” in the performance of the act that is the basis of the lawsuit and that the case, therefore, is governed by the 2-year period of limitations applicable to medical malpractice claims. Regalski v Cardiology Associates, P.C., 459 Mich 891; 587 NW2d 502 (1998).

Another pertinent decision was issued a year later. In a pair of consolidated cases, this Court considered whether dismissal had been appropriate for failure to comply with malpractice requirements, in spite of the plaintiff’s claim that her claim sounded in ordinary negligence. She alleged that she was the victim of an assault and battery while a patient at defendant hospital, due to inadequate staffing to supervise psychiatric patients. Dorris v Detroit Osteopathic Hospital,

460 Mich 26, 31; 594 NW2d 455 (1999). The opinion notes:

Heritage argues that Gregory's claim that defendant Heritage failed to properly supervise and monitor patients is a medical malpractice action requiring a notice of intent to sue and an affidavit of merit and that the trial court erred in finding that the claim was an ordinary negligence action.

A complaint cannot avoid the application of the procedural requirements of a malpractice action by couching its cause of action in terms of ordinary negligence. Id at 43.

This Court affirmed the rule that:

The key to a medical malpractice claim is whether it is alleged that the negligence occurred within the course of a professional relationship. The providing of professional medical care and treatment by a hospital includes supervision of staff physicians and decisions regarding selection and retention of medical staff. (Citation omitted.)

The determination whether a claim will be held to the standards of proof and procedural requirements of a medical malpractice claim as opposed to an ordinary negligence claim depends on whether the facts allegedly raise issues that are within the common knowledge and experience of the jury or, alternatively, raise questions involving medical judgment. Id at 45-46.

After evaluating the facts, this Court held:

As in *Bronson, Starr & Waatti*, these allegations concerning staffing decisions and patient monitoring involved questions of professional medical management and not issues of ordinary negligence that can be judged by the common knowledge and experience of a jury. The ordinary layman does not know the type of supervision or monitoring that is required for psychiatric patients in a psychiatric ward. Thus, the trial court erred in not requiring that plaintiff provide a notice of intent to sue and an affidavit of merit . . . Id at 47.

A recent decision by the Court of Appeals is worth reviewing. A diabetic patient was injured while being transferred from a toilet to her wheelchair, and obtained a verdict. The plaintiff objected that the non-economic damage limitations applicable to malpractice actions (MCL §600.1483) should not apply to the claim. On appeal, the court referred to Dorris and Regalski for a definition of medical malpractice and concluded that "plaintiff's claim was of medical malpractice because the ordinary layman does not know the methods and techniques for

transferring patients. Reading the claim as a whole, it is clear that plaintiffs' claim against defendant sounded in medical malpractice." Wiley v Henry Ford Cottage Hospital, \_\_\_ Mich App \_\_\_, \_\_\_ NW2d \_\_\_ (2003). (App pp 256-264.)

The court went on to note that:

plaintiff's proofs and closing argument all clearly show that plaintiff was trying a medical malpractice case. During trial, plaintiff called a nursing expert and asked questions regarding the standard of care. In closing argument, plaintiff's counsel argued: "the defendants in this case were professionally negligent in their care of Ms. (sic) Wiley in their hospital. They violated nursing standards. They didn't prevent risk of injury to Mrs. Wiley's remaining extremity. The transfer of Mrs. Wiley on 3-29 from the toilet to the wheelchair was done in an unsafe, non-nursing professional manner and that caused injury to her." Id.

A survey of decisions from other jurisdictions suggests that the general approach to the distinction between malpractice and ordinary negligence is fairly universal. A pair of New York cases are instructive.

The plaintiff fractured her ankle while alighting from the defendant physician's examining table and commenced this action to recover for her injuries approximately two years and eleven months later. On the defendant's motion for summary judgment . . . the only issue is whether this action is governed by the . . . statute of limitations for medical malpractice actions or . . . for negligence actions generally. . . .

The critical question in determining whether an action sounds in medical malpractice or simple negligence is the nature of the duty to the plaintiff which the defendant is alleged to have breached (citations omitted). When the duty arises from the physician-patient relationship or is substantially related to medical treatment, the breach gives rise to an action sounding in medical malpractice, not simple negligence. . . .

The complaint and bill of particulars . . . alleged that the defendant was negligent in four ways: failing to supervise the plaintiff's placement on the examining table, failing "to keep her under constant surveillance in view of her complaints", failing to assist her in getting off the table, and failing to respond to her request for assistance. There is no claim that the condition of the defendant's table or premises was in any way a cause of the plaintiff's injuries.

These allegations establish that the duty the defendant is charged with violating arose from the physician-patient relationship and was substantially related to his treatment of the plaintiff. Had the plaintiff not consulted the defendant in his

capacity as a physician, there would have been no reason for her to be on his examining table in the first place. Stanley v Lebetkin, 123 AD 2d 854; 507 NYS2d 468 (1986 N.Y.App.Div. LEXIS 60972)(App pp 265-266).

The Stanley decision was cited in 1999, in a case where the plaintiff alleged that the defendant doctor was careless in placing her “in the care of a totally unskilled person” who subsequently left her unattended in a treatment room. Lippert v Yambo, 267 AD 2d 433; 700 NYS2d 848 (1999 N.Y.App.Div. LEXIS 13324).(App pp 267).

The critical factor is the nature of the duty owed to the plaintiff that the defendant is alleged to have breached. When the duty arises from the physician-patient relationship or is substantially related to medical treatment, the breach gives rise to an action sounding in medical malpractice, not simple negligence (citation omitted).

The incident arose out of the physician-patient relationship. Moreover, the duty owed to the plaintiff in the aftermath of medical treatment derived from the same duty owed as a result of the doctor-patient relationship (citation omitted). Id

Three cases from Nebraska provide further analysis of the theme. One involved fraudulent concealment of a patient’s condition, which was labeled as malpractice.

We do not think that the advice and the statements of a physician as to the nature and cause of a patient’s condition, as a part of the necessities of treating and consulting with the patient, are separable. They are the essentials to the performance of the physician’s whole duty to the patient. We do not think that the Legislature, when it enacted the special limitation statute of two years on malpractice intended to separate certain portions of the whole physician-patient relationship and apply a confusing standard of two and four years to different portions of that relationship, or to require the courts to make such a nebulous and difficult fact separation and determination. Stacey v Pantano, 177 Neb 694; 131 NW2d 163 (1964). (App pp 268-269.)

Another claim involved negligence in performing a blood-type evaluation of the plaintiff.

The court framed the question as whether professional services were being provided at the time.

A “professional” act or service is one arising out of a vocation, calling, occupation, or employment involving specialized knowledge, labor, or skill, and the labor and skill involved is predominately mental or intellectual, rather than physical or manual. . . . In determining whether a particular act is of a professional nature or a “professional service” we must look not to the title or character of the party performing the act, but to the act itself. . . . The court must

look to the nature of the act itself and the circumstances under which it was performed. Marx v Hartford Accident and Indemnity Co., 183 Neb 12; 157 NW2d 870 (1968). (App pp270-271.)

The court found that the “blood test was an essential and integral part of the rendition of professional services” and the “professional relationship was the stimulus for the performance of the blood typing test on [the plaintiff], and the test and the interpretation of its results all occurred during the course of the professional relationship.” Id at 656.

A 1999 case involved an injury which resulted when the physician adjusted the headrest of the examination chair, striking the patient’s head. In denying the plaintiff’s claim, the court cited with approval both of the previously discussed decisions, as well as the New York opinion in Stanley. The court held:

It can only be inferred from [plaintiff’s] averments that when the alleged act of negligence occurred, [defendant] was positioning [plaintiff] for the purpose of rendering her a service in his role as her physician. Olsen v Richards, 232 Neb 298; 440 NW2d 463 (1989). (App pp 272-274.)

An Illinois decision addressed a suit against an ambulance service, claiming “that the equipment necessary and precautionary to treat a person in plaintiff’s condition was lacking.” The court found that the “determination of which equipment is necessary and precautionary” to provide emergency services was “inherently one of medical judgment.” In the process, the court noted that, even when a claim might be made at trial without expert proofs, all of the other requirements in a malpractice action would otherwise be applicable. Lyon v Hasbro Industries, Inc., 156 Ill App 649; 509 NE2d 702 (1987 Ill App LEXIS 2616). (App pp 275-278.)

A Colorado decision worth reviewing arose when:

Woodal, an employee of St. Anthony’s, was pushing a cart on which Myers was riding for purposes of transporting Myers from his room to the physical therapy facility in the hospital. In the course of this endeavor, Woodal allegedly caused the cart to collide with some type of metal beam with the result that Myers was injured.

Myers first contends that it was error to dismiss his claim against St. Anthony's because the statute only affords protection to St. Anthony's if it is providing health care to patients by persons licensed in the healing arts. The record reflects that Woodal was not licensed to perform any of the healing arts specified in the statute and that she was merely transporting Myers from one area of the hospital to the other. Thus, Myers reasons that no "health care" was involved at the time he was injured. We find no merit in this contention. Myers v Woodal, 42 Colo App 44, 45; 592 P2d 1343 (1978 Colo App LEXIS 694). (App pp 279-280).

\* \* \* \*

The transportation of a patient from one area of a hospital to another for the purpose of receiving physical therapy is inextricably involved with providing care for that patient. The term "providing care" must be deemed to contemplate all activities of hospital employees which are ancillary to and inherently involved in providing medical service to the patient. Id at 45-46.

## 2. The Ordinary Negligence Cases

Plaintiffs arguing for ordinary negligence frequently cite three decisions, including two Court of Appeals holdings from the 1960's and an opinion by a federal district judge. In Fogel v Sinai Hospital of Detroit, 2 Mich App 99; 138 NW2d 503 (1965), a patient alleged that, when she asked for help to the bathroom, the single aid was inadequate to perform the task, leading to a fall and a broken hip. After a verdict for plaintiff, the hospital appealed, arguing that no proofs had established a standard of care or breach thereof. The court found that, as a general rule and excepting malpractice actions, expert testimony as to the standard of care was unnecessary. Without discussion of the essential nature of the activity involved, the court characterized the

claim as one involving "Subtherapeutic, ordinary, careful and prudent treatment."

A 1997 federal district court decision followed Gold and Fogel, although first thoroughly reviewing Michigan law. It was noted that a claim by a patient who had fallen in a hospital might be brought against a facility as either malpractice or ordinary negligence, where “the same set of facts can support either of two distinct causes of action.” McLeod v Plymouth Court Nursing Home, 957 F Supp 113 (1997 US Dist LEXIS 4140)(citing Adkins, *supra*.) It also acknowledged the rule that “a complaint cannot avoid the application of the procedural requirements of a malpractice action by couching its cause of action in terms of ordinary negligence.” Further, when a dispute arises, the question turns on “whether the facts alleged present issues which are within the common knowledge and experience of the jury or, in the alternative, raise a question of medical judgment.” Id at 115. On that basis, this judge characterized the claim as sounding in ordinary negligence. Id at 116.

Finally, an unpublished opinion by the Court of Appeals has been accepted for review by this Court as a companion to the present appeal. A resident in a skilled-nursing facility “died of asphyxiation when she became wedged between the mattress and bed rails of her bed.” The court focused upon plaintiff’s allegation that defendant “negligently and recklessly failed to assure that plaintiff’s decedent was provided with an accident-free environment.” This claim was held to involve ordinary negligence. “Moreover, plaintiff’s complaint does not allege that the use of the bed rails was inappropriate in this case.” Acknowledging that a plaintiff cannot avoid procedural requirements of a malpractice action by labeling it as ordinary negligence, the court pointed out that a legitimate negligence action could apply to “the conduct of one who happens to be a medical professional.” The court found that this “complaint sounds in ordinary negligence and not medical malpractice”. Bryant v Oakpointe Villa Nursing Centre, Inc., COA #’s 228972, 234992 (2002 Mich App LEXIS 725). (App pp 281-285).

### **C. Substantive and Procedural Requirements Applicable to Malpractice**

A number of requirements, established either by statute or case law, apply to actions which involve medical malpractice. To begin with, MCL §600.2912a requires that a Plaintiff “in an action alleging malpractice” prove that the defendant failed to meet the applicable standard of care. The Plaintiff must also meet the “burden of proving that he or she suffered an injury that more probably than not was proximately caused by the negligence of the Defendant or Defendants.” MCL §600.2912b holds that “a person shall not commence an action alleging medical malpractice against a health professional or health facility unless” notice has been given under this section at least 182 days prior to commencement of the action. The notice must set forth the factual basis for the claim, the applicable standard of practice, the manner in which that standard was breached, the alleged action which should have been taken to achieve compliance, and an explanation of proximate cause. The requirements to identify the specifics of the action are carried forward to MCL §600.2912d, which requires that the Plaintiff provide an affidavit of merit signed by a health professional who appears to meet expert witness requirements, once again setting forth the applicable standard of practice, and the breach of that standard, the actions which should have been taken are omitted to achieve compliance, and a statement as to proximate cause. The qualifications for the expert witness come from MCL §600.2169, which requires that Plaintiff, in “an action alleging medical malpractice,” provide evidence as to the standard of care from a licensed health professional who has credentials similar to the defendant, based upon specialization, clinical practice, education and training. Our courts have determined that, generally, expert testimony is required to establish the standard of care and the defendant’s breach of that standard. See Lince v Monson, 363 Mich 135, 140; 108 NW2d 845 (1961); Paul v Lee, 455 Mich 204; 568 NW2d 510 (1997). The requirement for expert testimony extends to the issue of proximate cause. See Thomas, *supra*.

The above requirements must be applied to any action which involves medical malpractice, regardless of how the plaintiff chooses to plead or label the claim. McLeod, *supra*, is instructional. “The law which will be applied to the case ‘depends upon the theory actually **pled when the same set of facts can support either of two distinct causes of action.**’ See Adkins v Annapolis Hospital (addressing question of which statute of limitations applies when facts alleged support more than one theory of recovery).” (Emphasis added); McLeod, *supra*. Both Adkins and McLeod note that a preliminary stage in the analysis is to determine if the operative facts could support two different theories.

Plaintiff here alleges in her complaint that defendant breached its duty of reasonable care, the duty element required for ordinary negligence. **No reference is made to any breach or violation of a duty to exercise the degree of skill, care or diligence exercised by hospitals in the same or similar locality.**

**Nevertheless, a complaint cannot avoid the application of the procedural requirements of a malpractice action by couching its cause of action in terms of ordinary negligence.** MacDonald v Barbartto, 161 Mich App 542, 411 NW2d 747 (1987). Where the parties dispute whether the plaintiff has alleged malpractice or ordinary negligence, **courts have attempted to ascertain** whether the facts alleged present issues which are within the common knowledge and experience of the jury or, in the alternative, raise a question of medical judgment. (Emphasis added) McLeod, *supra* at 115.

McLeod and MacDonald were both cited with approval in Dorris, *supra*. It upheld the rule that a complaint could not avoid malpractice requirements “by couching its cause of action in terms of ordinary negligence.” Id at 43. As another opinion noted:

Plaintiff has alleged a failure on the part of the defendant to properly discharge his professional duties, thus, causing damage to plaintiff. The key to a malpractice claim is **whether it is alleged that the negligence occurred within the course of a professional relationship.** The allegations of this complaint indicate that the negligence occurred within such a relationship. **No matter how we read plaintiff’s complaint we must return to the conclusion that this is a malpractice claim.** (Emphasis added) Becker v Meyer Rexall Drug Company, 141 Mich App 481, 485; 367 NW2d 424 (1985).

A subsequent decision addressed a plaintiff’s mischaracterization of negligence

allegations. “Despite Plaintiff’s attempt to characterize his claim as one of corporate negligence, his claim is, in fact, one for medical malpractice. . . . Thus, we hold that plaintiff’s attempted differentiation of a claim for corporate negligence from a claim for medical malpractice for purposes of avoiding the arbitration agreement is without merit.” Danner v Holy Cross Hospital, 189 Mich App 397; 474 NW2d 124 (1991).

Another Michigan decision addressed an attempt by a plaintiff to avoid the requirements applicable to malpractice litigation by providing an alternate label to the claim.

A plaintiff may not evade the appropriate limitation period by artful drafting. (Citations omitted) The gravamen of an action is determined by reading the claim as a whole. (Citation omitted). The type of interest allegedly harmed is the focal point in determining which limitation period controls. (Citation omitted).

The key to a malpractice claim is whether it is alleged that the negligence occurred within the course of a professional relationship. (Citation omitted) A complaint may not avoid application of the two-year malpractice period of limitation merely by couching its causes of action in terms of ordinary negligence. Simmons v Apex Drug Stores, 201 Mich App 250; 506 NW2d 562 (1993).

Claims as to individuals employed by hospitals, as well as those hospitals, are subject to malpractice legislation.

Malpractice applies to an employee or agent of a licensed health facility or agency who is **engaging in or otherwise assisting in medical care and treatment**. . . . In this case, plaintiff, as a respiratory therapist employed by St. Joseph Hospital, was clearly ‘an employee or agent of a licensed health facility.’ Moreover, the alleged negligent act occurred while defendant was acting within that capacity. (Emphasis added) Bell v Mikkola, 193 Mich App 708; 485 NW2d 143 (1992).

See also Cox v Board of Hospital Managers, 467 Mich 1; 651 NW2d 356 (2002); Nippa v Botsford General Hospital, 251 Mich App 664; 651 NW2d 103 (2002).

#### **D. Application Herein**

In light of the above authority, the present action should be treated as a malpractice action, for three reasons. The facts sound in malpractice, the claim was tried (at least in part) as a malpractice action, and the verdict reflects a finding of professional negligence.

**1. The Facts Involve Allegations of Malpractice**

Allegations of negligently assisting a patient onto an examination table sound in malpractice. Regalski, *supra*. This claim involves allegations of helping a patient off of an examination table, and Regalski appears to control. There is no dispute that the only allegations against BCHS flow from alleged negligence of either Ms. Kever or Mr. Horton. Nor is there any dispute that the bone scan which Mr. Horton was undergoing was a medical procedure. Ms. Kever and Mr. Horton were involved, and had a professional relationship, only because of this medical procedure. The specific event in question involved helping an elderly patient who was receiving chemotherapy off of a tall, thin examination table, as opposed to helping someone off of a normal bed. The process of helping Mr. Ginger is outside of the routine and ordinary experience of the layperson.

The claim as to Mr. Horton sounds in malpractice for an additional reason. He was not actually involved in the procedure itself, but rather was behind a partition developing a film. A claim against him can only relate to a supervisory responsibility based upon his professional status as a trained and experienced technician. If, in fact, the process of assisting a patient off of a table is subject to an ordinary layperson standard, then the person who performs the procedure is responsible for complying with that standard, and is not subject to the direction and control of a more experienced person. Supervisory responsibility under these facts can only arise from some professional responsibility related to Mr. Horton's superior knowledge and training.

**2. The Claim Was Tried as a Malpractice Action**

From the outset, Plaintiff argued this claim to the jury as involving professional responsibility based upon the relationships of the parties involved. Although done under the label of ordinary negligence, Plaintiff was clearly arguing for professional negligence and, therefor, malpractice. Excerpts of Plaintiff's opening statement demonstrate this.

*Now, one thing was different on this occasion: that is, one primary or major thing was different than the other eight years or nine that he'd done this. On this occasion, Stephen Horton, who is the regular x-ray technician for the hospital has student in there, this young lady here, Brooke Kever. She was at KCC and she was studying and it was the start of her semester, this June of 1997, and it was her first bone scan that she'd ever done, and she was basically being trained or allowed to conduct this -- this bone scan that Mr. Ginger was there for.*

*Nobody asked him about this. They didn't ask for permission. She was just there, and so basically you'll find the technique and how they exchange the plates and so on and so forth. (Tr, p 50; App p 130.)*

\* \* \* \*

*His testimony is going to be that the next thing he heard just shortly after "Wait a minute. It'll take a couple minutes," the next thing he heard was a scream and he felt himself falling or sliding off the x-ray table.*

*The next thing he knew, he was on the floor. The next thing he realized his head and shoulders was in the arms or lap of Brooke Kever, the student x-ray technician. Where Steve Horton was, we--he didn't know. He'll testify that he--Mr. Ginger will testify he could hear them talking someplace in the room before this happened, but just exactly where they were, he cannot say.*

*Brooke Kever will testify that he was behind the control panel; that is, Mr. Horton, the regular technician was not even anywhere near the table but was someplace behind doing something. (Tr, p 51; App p 131.)*

\* \* \* \*

*We feel that based upon the testimony and as we set forth in our complaint that the hospital is responsible by way of the negligence of either Mr. Horton and/or Brooke Kever, that they--when he fell.*

*Under any circumstances you can imagine, this gentleman should not have been allowed to fall. We allege that they failed to operate this table in a satisfactory way, that they failed to take precautions of those necessary, they failed to keep an ob--an appropriate observation of him.*

*All in all, they're just--under the circumstances, they didn't do their job and you can hear the testimony and find out whether we agree. (Tr, p 55; App p 132.)*

During the case in chief, Plaintiff then elicited testimony to back up his theory of professional negligence due to a supervisory relationship. Pertinent testimony by Mr. Ginger has been set forth at pages 9-11 herein. He noted that Ms. Kever positioned him for each x-ray and Mr. Horton, although he checked every time, made no changes. However, he was not told what the "young lady" was doing, nor asked if it was acceptable.

The theme was carried through into closing argument.

*And he had done that successfully without incident or episode for some seven or eight years, and on all of those occasions that he went there, there was only one employee or technician that conducted this.*

*But on June 26, 1997, Mr. Ginger's life changed. He was there having his bone survey done but what he didn't know is that there was going to be a student trainee there that was going to be conducting these x-rays . . .*

*But I want to point out to you because I think it is a consideration of your part as to whether or not you're going to find the defendant negligent is nobody asked Mr. Ginger if this was alright with him. As it turns out, that - - that was an important factor. (Tr, p 397; App, p 178.)*

\* \* \* \*

*Well, if that's the case, certainly Mr. Ginger didn't - - wasn't authorizing that, wasn't asked about that, and here we have eight years that he has gone in there for this operation. One person has been there. He's always followed instructions and nothing has happened and now we have two people in there because we've got a class going on while Mr. Ginger is being taken care of and he ends up off the table. (Tr, pp 400-401; App pp 179-180.)*

A final indicator of the confusion between ordinary negligence and malpractice embodied in the Plaintiff's case in chief is found by a review of rulings by the trial judge.

*THE COURT: Okay. Well, here is my ruling. I'm going to deny the motion for directed verdict. The case cited is instructive and interesting. It's a series of cases actually that the Supreme Court addressed and there is the language that Mr. Wyngaarden has argued, and it certainly is a close case. I recognize that fact. The arguments made by the defendant are -- are certainly good ones and an appellate court may well -- well decide that they are the proper arguments and that this Court should have granted a motion for summary disposition and/or a motion for directed verdict. I can see that as a possibility, but as the court has previously recognized, there is the possibility of suing on a claim of ordinary negligence in what would otherwise be seen perhaps as a medical malpractice action. (Tr, pp 340-341; App, pp 168-169.)*

The Judge once again highlighted the importance of certain professional factors in his decision denying post-trial motions.

*There was a prima facie case of ordinary negligence presented by plaintiff where the proofs showed that Horton knew of plaintiff's age and medical background and was familiar with the table plaintiff had to get on and off of. The common law imposes on everyone an obligation to use due care to protect another from an unreasonable risk of injury. Horton was directing plaintiff in a situation where it*

*was reasonable to assume plaintiff would be relying upon Horton's instructions as to what he, plaintiff was to do and when he was to do it. It is certainly arguable that Horton had a general duty to use reasonable and due care under the circumstances to see that the elderly plaintiff didn't fall from the elevated table. It is likewise arguable that Horton was negligent in his admitted failure to observe the plaintiff and to be ready to provide immediate assistance to him, given the plaintiff's age, health, and physical circumstances as the plaintiff was trying to rise up from and then get down off of the examining table.*

*It is also arguable that Horton, unlike the young student trainee Ms. Kever, had years of experience in observing patients and any difficulty which those patients might have in negotiating themselves on and off an examining table. (Op; App pp 245-246.)*

### **3. The Verdict Reflects a Finding of Malpractice**

The jury indicated on the Special Verdict Form that Ms. Kever, who was the only individual actually present with the Plaintiff at the time of the fall, was not negligent. However, Mr. Horton, who testified at trial that he was standing behind the control panel, several feet away at the time in question, was found to be 100 percent responsible for Mr. Ginger's injuries.

Mr. Horton's liability could only be based on his capacity as a supervisor or clinical instructor in the radiology program at the hospital. The common law does not impose liability against a non-actor, when the actor does something subject to an ordinary negligence standard. There was no evidence, nor is it readily apparent, that he should have switched places with Ms. Kever. However, the jury heard argument, and came to a decision, based on the reasonableness of Mr. Horton's professional decision to permit Ms. Kever to conduct the bone scan, an argument which implicates his status as a trained technician and instructor, and which should have been supported by expert testimony. Therefore, the jury's finding was entirely irreconcilable with an ordinary negligence cause of action.

There is only one realistic explanation for the jury verdict. The members were exposed to repeated arguments that the presence of a student trainee was a violation of proper protocol, and that Mr. Ginger should have been asked to consent to this arrangement. Although no proofs, or

even a reasonable argument, were offered to explain that this was necessary or how it resulted in the fall, the jury was clearly asked by Plaintiff's counsel to factor these issues into its decision. The fact that the actual participant, Ms. Kever, was found to be not at fault, while the non-participating instructor was 100% at fault, can only be explained by a verdict based upon the assumption that the instructor had some sort of heightened, professional duty. In short, the jury held Mr. Horton to a professional standard of care, regardless of the jury instructions.

**Argument II SJI2d 10.02 Should Have Been Tailored To Instruct The Jury As To The Standard Of Care Applicable To A Reasonably Prudent Radiology Technician.**

**A. Standard of Review**

Jury instructions should include “all the elements of the plaintiff’s claims and should not omit material issues, defenses, or theories if the evidence supports them.” Case v Consumers Power Company, 463 Mich 1, 6; 615 NW2d 17 (2000). An error in the jury instructions warrants reversal if the error resulted in unfair prejudice to the extent that failure to vacate the verdict would be inconsistent with substantial justice. Johnson v Corbet, 423 Mich 304, 327; 377 NW2d 713 (1985).

We review claims of instructional error de novo. Jury instructions should include “all the elements of the plaintiff’s claims and should not omit material issues, defenses or theories if the evidence supports them” (citation omitted). Instructional error warrants reversal if the error “resulted in such unfair prejudice to the complaining party that the failure to vacate the jury verdict would be ‘inconsistent with substantial justice’.” Cox v Board of Hospital Managers, 467 Mich 1, 8; 651 NW2d 356 (2002).

To preserve for review issues concerning jury instructions, a party must object on the record before the jury deliberates. Unpreserved objections may be reviewed when necessary to prevent manifest injustice where inappropriate instruction constitutes plain error, requires a new trial, or pertains to the basic and controlling issue in a case. When a verdict is clearly contrary to law and is related to a controlling issue affected by the jury instruction, review is appropriate in order to prevent manifest injustice. Bieszck v Avis Rent-A-Car System, 224 Mich App 295; 568 NW2d 401 (1997), *rev’d on other grounds*, 459 Mich 9; 583 NW2d 691 (1998). A jury verdict may be vacated when the trial court fails to give a properly requested, accurate and applicable jury instruction, if failure to set aside the verdict would be inconsistent with substantial justice. Johnson v White, 430 Mich 47; 420 NW2d 87 (1988).

**B. Without Modification, SJI2nd 10.02 Did Not Adequately State the Applicable Standard of Care**

The jurors were improperly given the generic SJI 2d 10.02 definition of ordinary negligence, without its having been tailored to fit the facts of this case. The jury was instructed on what a reasonable person would do, when they should have been instructed to consider what a reasonable radiology technician, or student technician would do. The instruction reads:

SJI 2d 10.02: Negligence of Adult–Definition:

Negligence is the failure to use ordinary care. Ordinary care means the care a reasonable person would use. Therefore, by “negligence” I mean the failure to do something that a reasonably careful person would do or the doing of something that a reasonably careful person would not do, under the circumstances that you find existed in this case.

Use of standard jury instructions is regulated by MCR 2.506(D)(2), which requires that a trial court give a standard instruction if (1) it is applicable, (2) it accurately states the applicable law, and (3) a party requests the instruction. In situations where standard jury instructions may not be sufficient, the trial court has discretion to provide additional or modified instructions which clarify applicable law not covered or clearly expressed by the standard versions. See MCR 2.516(D)(4). When the standard jury instructions do not adequately cover an area of law, the trial court is obligated to give additional instructions when requested, if those supplemental instructions are supported by the evidence and properly inform the jury of the applicable law. Koester v Novi, 213 Mich App 653, 664; 540 NW2d 765 (1995), aff’d in part, rev’d in part on other grds, 458 Mich 1; 580 NW2d 835 (1998). When the standard jury instructions are inadequate to treat the legal issue at hand, the Court is obligated to give additional instructions when requested, provided that they properly inform of the applicable law and are supported by the evidence. Stoddard v Manufacturers National Bank, 234 Mich App 140; 593 NW2d 630 (1999).

Though SJI2d 10.02 notes that “the law does not say what a reasonably careful person” would or would not do, and the jury must make that decision, both the note on use and the comment which follow the instruction provide further insight. “Use of the word ‘person’ may be inappropriate depending on the nature of the defendant’s activity.” (See Note on Use to SJI 2d 10.02.)

Under Michigan law, the standard of conduct required may differ depending on the activity, trade, occupation, or profession, but the degree of care does not change. It is always what a reasonably careful person engaged in a particular activity, trade, occupation, or profession would do or refrain from doing under the circumstances then existing. (See Comment to SJI 2d 10.02.)

The jury instructions reflect a long-standing tradition in Michigan law. No man is held by law to a higher degree of skill than the fair average of his profession or trade, and the standard of due care is the conduct of the average prudent man. . . . Juries must necessarily determine the responsibility of individual conduct, but they cannot be allowed to set up a standard which shall in effect dictate the customs or control the business of the community. Ferderick v City of Detroit, 370 Mich 425; 121 NW2d 918 (1963).

It is well-settled that in a negligence case, the jury must be instructed to apply the proper standard of care, and be informed of what that standard is. Laney v Consumers Power Co, 418 Mich 180; 341 NW2d 106 (1983). Assuming arguendo that the case was properly heard as ordinary negligence, the jury should be instructed to apply the proper standard of care which, in this case, is that of a reasonable radiology technician. In Laney, the Michigan Supreme Court held that the standard of care applicable to the Defendant in the case was one of reasonable care measured by what a reasonably careful person or company engaged in maintaining electric power lines would do under the same circumstances. The Court then recognized the potentially misleading nature of using an unmodified version of SJI 2d 10.02, when it said:

Absent this crucial instruction, the jury may well have judged the defendant’s conduct by what a reasonably careful person not engaged in defendant’s business would have done under the circumstances.” (Laney, *supra* at p 187)

Under a theory of ordinary negligence, the jury must be instructed to measure the Defendant's conduct by what a reasonable individual engaged in the business of performing bone scan procedures would do in the same circumstances. This necessary modification of the instruction was improperly omitted from the jury's consideration, resulting in an incorrect and misleading instruction as to what a reasonable person would do. There may be multiple valid reasons which would lead a reasonable radiology technician to act differently than a reasonable person off the street, including professional knowledge of how the tables are constructed, whether the side rails interfere with mobility or how the patient's condition is affected by the procedure and medications. Due to the potential of this instruction to mislead the jury, Defendant's request for a modified version should have been granted.

### **Argument III**

### **Directed Verdict/Judgment Notwithstanding the Verdict and/or New Trial Should Have Been Granted**

#### **A. Standard of Review**

Please see discussion under Argument I, Heading A, Standard of Review (P 15 herein).

#### **B. Elements of a Negligence Action**

To establish a prima facie case of negligence, Plaintiff is bound by law to introduce evidence sufficient to establish (1) that Defendant owed a duty to Plaintiff, (2) that Defendant breached that duty, (3) that Defendant's breach was a proximate cause of Plaintiff's injuries, and (4) that Plaintiff suffered damages. Spikes by Simmons v Banks, 231 Mich App 341; 586 NW2d 106 (1998). Duty is the threshold element of a negligence action. Blackwell v Citizens Ins. Co. of America, 457 Mich 662; 579 NW2d 889 (1998); Hammack v Lutheran Social Services of Michigan; 211 Mich App 1; 535 NW2d 215 (1995); Summers v City of Detroit, 206 Mich App 46; 520 NW2d 356, appeal denied 449 Mich 859; 535 NW2d 792, reconsideration denied 454 Mich 852; 558 NW2d 724. Absent a legal duty, there can be no actionable negligence. Reed v Michigan Metro Girl Scout Council, 201 Mich App 10; 506 NW2d 231 (1993). In Reed, the Court of Appeals explained the indispensable nature of duty in negligence actions:

There is no quarreling with plaintiff's observations that 'negligence is a legally recognized cause of action in Michigan.' However, it is well settled that in the absence of a legal duty there is no actionable negligence. *Balcer v Forbes*, 188 Mich App 509, 512, 470 NW2d 453 (1991). Only if the law recognizes a duty to act with due care arising from the relationship of the parties does it subject the defendant to liability for negligent conduct. *Friedman v Dozor*, 412 Mich 1, 22, 312 NW2d 585 (1981).

It is well-established law that a jury can not speculate as to duty. In White v Beasley, 453 Mich. 308; 552 N.W.2d 1 (1996), the Court held that due to the special nature of a policeman's duties, a jury could not speculate as to the scope of that duty.

Plaintiff must also establish causation, and available case law elaborates upon the extent

to which that element must be proven. In Weymers v Khera, 454 Mich 639; 563 NW2d 647 (1997), the Court held that “the plaintiff must present substantial evidence from which a jury may conclude that more likely than not but for the defendant's conduct, the plaintiff's injuries would not have occurred .... A mere possibility of such causation is not enough; and when the matter remains one of pure speculation or conjecture, or the probabilities are at best evenly balanced, it becomes the duty of the court to direct a verdict for the defendant.” Another decision adds to the analysis. “[T]he cause in fact element generally requires a showing that ‘but for’ the defendant’s actions, the plaintiff’s injury would not have occurred.” Skinner v Square D Co, 445 Mich 153; 163; 516 NW2d 475 (1994). The Supreme Court further explained that “to be adequate, a plaintiff’s circumstantial proof must facilitate reasonable references of causation, not mere speculation,” and reaffirmed that “the plaintiff must present substantial evidence from which a jury may conclude that more likely than not, but for the defendant’s conduct, the plaintiff’s injuries would not have occurred.” *Id* at 164-165. The Court noted that it has “consistently applied this threshold evidentiary standard of factual causation in negligence cases:”

The plaintiff must introduce evidence which affords a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a cause in fact of the result. A mere possibility of such causation is not enough; and when the matter remains one of pure speculation or conjecture, or the probabilities are at best evenly balanced, it becomes the duty of the court to direct a verdict for the defendant. *Id.* at p 165; *citations omitted*.

### **C. Analysis of Proofs and Argument Below**

There is no dispute that this claim was labeled by Plaintiff as an ordinary negligence action. Available testimony regarding the events, from the only three available witnesses, has been detailed at pages 9-14 herein. It is abundantly clear that Mr. Horton was an instructor supervising and training Ms. Kever, a student. She positioned the patient for each film, after which he checked and approved the arrangements, and then moved away. When the films were

completed, Mr. Horton went behind a partition, and Ms. Kever assisted Mr. Ginger off the table. None of the three could testify as to exactly how the fall occurred, and the only details that are certain are that Mr. Ginger moved and changed his position in some fashion, and both he and Ms. Kever found up on the floor with his head and shoulders cradled in her lap.

Conspicuously absent is testimony, either by Mr. Horton, Ms. Kever or anyone else, as to exactly what the participants were supposed to be doing. In the same vein, there was not a single statement that any specific event or action was either improperly planned or executed. The essence of the claim was that Mr. Ginger shouldn't have fallen. Further, as demonstrated by statements taken from opening and closing arguments (see pp 32-33 herein), Plaintiff's argument was essentially that, although nobody was clear on how the fall occurred, and he couldn't pinpoint any specific wrong, the outcome itself never should have happened and was proof of a mistake.

**D. The Verdict was Against the Great Weight of Evidence as to Ordinary Negligence**

The evidence in this trial has been flyspecked and analyzed repeatedly before the trial judge, and the Court of Appeals. Plaintiff has been unable to offer any proofs more supportive than as referenced herein. The evidence presented is simply inadequate to satisfy the Plaintiff's burden of proof as to the elements of a negligence action.

Under a simple negligence theory, Plaintiff must establish a specific duty and a breach thereof. The evidence is replete with examples which demonstrate that, in fact, none of the participants was quite clear on exactly what duty was being alleged, or how it had been breached. There was no testimony that either Ms. Kever or Mr. Horton should have been doing (or not doing) any particular act in any particular place at any particular point in the medical procedure. Similarly, at no point did anyone testify as to exactly what Ms. Kever did wrong in assisting the

patient from the table, or what Mr. Horton did wrong as he was developing film behind a partition. Further, no specific mistake has been shown to cause Mr. Ginger's fall. Even assuming that this case did involve an ordinary negligence action, and further assuming that negligence actually took place during the performance of the procedure, there is simply no testimony as to what should have been done, or where someone went wrong.

Plaintiff seemed, at times, to be relying upon a *res ipsa loquitor* theory, arguing that the mere fact that Mr. Ginger fell was enough. For example, during opening and closing statements (pertinent portions set forth herein at pages 32-33) counsel repeatedly told the jury that "the next thing" that happened or that Mr. Ginger knew was that he was on the floor. "Under any circumstances you can imagine, this gentleman should not have been allowed to fall." Further, "under the circumstances, they didn't do their job and you can hear the testimony and find out whether we agree." Later, counsel pointed out that the bone scan had been done successfully for seven or eight years, but on this date, something was different. Essentially, the claim was that the difference was the presence of a student, and this must have caused the fall because no other explanation has been provided.

The evidence is insufficient to establish a *res ipsa loquitor* claim. Generally speaking, a plaintiff must prove (1) that the event must be of a kind which ordinarily does not occur in the absence of someone's negligence, (2) the event was caused by an agency or instrumentality within the exclusive control of the defendant, (3) the event must not have been due to any voluntary action or contribution on the part of the plaintiff, and (4) evidence of the true explanation of the event must be more readily accessible to the defendant than to the plaintiff. Jones v Porretta, 428 Mich 132, 150-51; 405 NW2d 863 (1987). There is no evidence, nor any reason, to believe that a fall from an examination table does not occur in the absence of negligence. There is nothing to suggest that the fall was caused by the hospital, but rather

suggests that the fall was caused by Mr. Ginger, and that Ms. Kever was unable to prevent it. In fact, the jury found that the event was, in part, due to voluntary action or contribution on the part of the Plaintiff, finding him 20% comparatively at fault. Finally, there is no reason to believe that the true explanation of the event is more accessible to the hospital than to the patient. The proofs herein fail to satisfy even one, let alone all four, of the essential elements of a *res ipsa loquitor* action.

**E. The Jury Verdict was Irreconcilable with an Ordinary Negligence Theory**

Admittedly, the jury is normally the trier of fact, and its decision is generally to be followed, even if it doesn't make as much sense as would be hoped. This court has held that "it is fundamental that every attempt must be made to harmonize a jury's verdicts. Only where verdicts are so logically and legally inconsistent that they cannot be reconciled will they be set aside." Granger v Fruehauf Corporation, 429 Mich 1; 412 NW2d 199 (1987).

An automobile accident led to a detailed statement of the treatment for apparently inconsistent or contradictory verdicts. After the car's brakes failed, an action alleged both negligent design and breach of warranty against the manufacturer. The jury found for the plaintiff on the former and the defendant on the latter. The trial court found the verdicts to be inconsistent and set them aside. The Court of Appeals reversed that decision. This court granted an application.

In Granger v Fruehauf Corp., 429 Mich 1; 412 NW2d 199 (1987), a jury likewise found negligence but no breach of the implied warranty of fitness. There, too, the Court of Appeals set aside a judgment for the plaintiff on the ground that the verdicts were legally inconsistent. As we reinstated the judgment of the circuit court, we explained that "if there is an interpretation of the evidence that provides a logical explanation for the findings of the jury, the verdict is not inconsistent." . . . It is fundamental that every attempt must be made to harmonize a jury's verdicts. Only where the verdicts are so logically and legally inconsistent that they cannot be reconciled will they be set aside.

In Granger, it was plausible for the jury to find negligence but not breach of

warranty. . . . In the same manner, the present case requires a careful look, beyond the legal principles underlying the plaintiff's causes of action, at how those principles were argued and applied in the context of this specific case. Lagalo v The Allied Corporation, 457 Mich 278, 282-283; 577 NW2d 462 (1998).

In a footnote, the opinion added:

To implement the teaching of Granger, one must consider the evidence in the full context of the case, including the arguments of counsel, the instructions given by the court, and, if appropriate, the pleadings. Id at 287, note 10.

The Court concluded:

On the record of *this* case, it is plausible to suppose that the jury was persuaded by defense counsel's argument regarding the breach of implied warranty, but was unpersuaded by his arguments concerning negligence. . . . Accordingly, we are satisfied that the verdict rendered by the jury is not logically inconsistent or irreconcilable. For these reasons, we reverse the judgment . . . Id at 287-288.

The principles behind Granger and Lagalo were concisely summarized as follows:

A jury's verdict is to be upheld, even if it is arguably inconsistent, "if there is an interpretation of the evidence that provides a logical explanation for the findings of the jury." 429 Mich at 7. In deciding whether to grant a new trial, a circuit court must "make every effort to reconcile the seemingly inconsistent verdicts." 457 Mich at 282. Further, such an effort "requires a careful look, beyond the legal principles underlying the plaintiff's causes of action, at how those principles were argued and applied in the context of this specific case. 457 Mich at 284-285. See Bean v Directions Unlimited, Inc., 462 Mich 24; 609 NW2d 567 (2000).

The verdict herein is so logically inconsistent with an ordinary negligence theory that, in spite of the above precautions, it must be set aside. As discussed at length above, there is an argument to be made that this case should have proceeded as malpractice from the outset. There is certainly an element of medical treatment woven throughout the fact situation presented herein. It has been emphasized that, particularly as to Mr. Horton, no duty could possibly arise other than through a professional relationship arising out of the provision of medical treatment. It was this role as instructor and trained professional that was argued by Plaintiff. It must have been this role that convinced a jury to find him negligent for his non-negligent trainee. However, once we broach the subject of professional responsibility based upon the supervisor's experience and

training, we have veered into malpractice territory.

On the other hand, if we stick to an ordinary negligence framework, we find that the jury verdict found that Ms. Kever, the active participant, breached no duty sounding in ordinary negligence. However, Mr. Horton was found negligent for supervising those actions which, as we just noted, were found to be appropriate. It is logically untenable to find the actor to be non-negligent and the non-participant to be negligent (for supervising someone who did the job correctly). The only explanation can be greater expectations based upon experience and training.

One may respond that it should be readily obvious that Mr. Horton should not have allowed Ms. Kever to perform the procedure. In fact, the Court of Appeals even hinted in that direction, noting that “perhaps” the jurors had been able to physically view the participants and might have drawn conclusions from those observations. However, even if this were a valid legal basis for the verdict, it still fails to get around the inconsistency of the verdict, if we stay in ordinary negligence. In short, if it was a matter of ordinary common sense, readily apparent to the casual observer, that Ms. Kever was not qualified to perform the procedure, then this was as apparent to her as it was to Mr. Horton, and perhaps more so. There is no evidence that Mr. Horton should have figured this out, while Ms. Kever should not. If the actions herein are subject to an ordinary negligence standard, this can only be because the performance of the procedure was something which everyone could understand and, therefore, should be able to do as well. At a minimum, every person should be able to determine whether he or she is capable of performing a task that the ordinary layman knows how to perform. To hold the supervisor liable can only follow from holding him to a higher standard, based upon experience and training. There is no way to get around the fact that, in finding the active participant to be non-negligent while finding the supervisor to be negligent, the jury issued a decision which cannot fit within the framework of ordinary negligence.

### **Request for Relief**

BCHS requests that this Court reverse the trial court and the Court of Appeals as to the decision to allow this claim to proceed as ordinary negligence, and grant summary disposition for Plaintiff's failure to comply with medical malpractice requirements. It is further requested that this Court reverse the trial court and the Court of Appeals as to the request for directed verdict and/or judgment not on the verdict, and enter judgment in favor of Defendant, for failure to provide proof sufficient to establish the elements of an ordinary negligence action. Further, in the event that the above requests are rejected, Defendant requests this Court remand for a new trial, during which the jury be instructed that BCHS employees Ms. Kever and Mr. Horton should be held to the standard of care of reasonably prudent radiology technicians, rather than reasonably prudent persons.

Respectfully submitted,

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